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T.R.A. DOCKET ROOM

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May 18, 2004

Deborah Taylor Tate, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Pkwy  
Nashville, TN 37243-0505

*Via Hand Delivery*

Re: Petition of On-Site Systems, Inc To Amend Its Certificate of Convenience and  
Necessity  
Docket No 03-00329

and

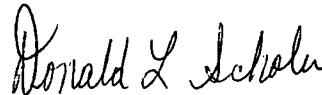
Petition of Tennessee Wastewater Systems, Inc To Amend Its Certificate of  
Convenience and Necessity  
Docket No 04-00045

Dear Chairman Tate

I have enclosed for filing the original and fourteen copies of the Memorandum of Law of  
Tennessee Wastewater Systems, Inc in this consolidated matter Please return the extra copy of the  
Memorandum of Law to me stamped filed

Thank you for your assistance in this matter

Sincerely yours,



DONALD L. SCHOLES

Enclosures

c: Charles Pickney, Jr  
Mark Jendrek  
Charles B. Welch, Jr  
G. Scott Thomas

BKSJ File No 04-189

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

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**IN RE:**

**PETITION OF ON-SITE SYSTEMS, INC. TO  
AMEND ITS CERTIFICATE OF  
CONVENIENCE AND NECESSITY**

**Docket No. 03-00329**

**MEMORANDUM OF LAW OF TENNESSEE WASTEWATER SYSTEMS, INC.**

**Introduction**

On May 10, 2004, the Hearing Officer in this case, Randal L. Gilliam, issued a Notice of Filing and Status Conference in this docket.<sup>1</sup> In the Notice of Filing and Status Conference, Mr. Gilliam requested that the parties file a Memorandum of Law on the following issue:

Whether the grant of a Certificate of Convenience and Necessity to a public utility (as defined by Tenn. Code Ann. § 65-4-101) providing wastewater treatment services in an identified service area operates to exclude other public utilities or non-utilities (as defined by Tenn. Code Ann. § 65-4-101) from providing wastewater treatment services in the identified service area.

**Discussion**

1. The grant of a certificate of public convenience and necessity by the Authority only excludes other public utilities as defined in T.C.A. § 65-4-101 from providing the same service in the same geographic area until the Authority determines additional utility service is required in the certificated service area.

A public utility as defined in T.C.A. § 65-4-101 must obtain a certificate of convenience and necessity from the Authority before it can provide a public utility service in a territory it desires to serve. T.C.A. § 65-4-201. Once a public utility has been granted a certificate, no other public utility can “begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving like service” without the other public

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<sup>1</sup> This docket has been consolidated with Docket No. 04-00045

utility obtaining a certificate from the Authority. Therefore, the public utility which first obtains a certificate to provide a utility service in a geographic area from the Authority has the “exclusive” right to provide such utility service only because no other public utility can provide the same utility service until the Authority grants another public utility a certificate to serve the same geographic area. Once the Authority determines that the public convenience and necessity requires the issuance of a certificate to another public utility to serve in the certificated area of an existing public utility, the first public utility no longer has the “exclusive” right to serve its certificated area.

Only a public utility as defined in T.C.A. § 65-4-101 is required to get a certificate from the Authority to provide a public utility service. Municipalities, counties, utility districts, cooperative organizations and certain nonprofit homeowners associations are not public utilities under Chapter 4 of Title 65 of the Tennessee Code Annotated. The Authority has no jurisdiction over the service areas of these nonutilities. The powers and rights of these nonutilities to provide public utility services are governed by other statutes in the Tennessee Code Annotated. The legislature has given very little statutory guidance on the competing rights of a nonutility to serve within the certificated area of a public utility.

Whether a nonutility has the prior right to serve within the certificated area of a public utility is a legal issue that must be decided by the courts and not the Authority when no specific statute is applicable. The Authority has no power to order a nonutility not to serve within the certificated area of a public utility because it has no regulatory power over such nonutilities. Therefore, the grant of a certificate to Tennessee Wastewater Systems, Inc. (formerly On-Site Systems, Inc.) (Company) in this docket only gives the Company an exclusive right to provide

sewer service to the extent that no other public utility can provide sewer service until the Authority grants another public utility a certificate to provide sewer service. To the extent the grant of the certificate prevents nonutilities as defined in T.C.A. § 65-4-101 from providing sewer service within the Company's certificated service area arises from the operation of other statutes governing such nonutilities and existing case law. Therefore, the grant of this certificate by the Authority can only operate to exclude another public utility from providing sewer service within its certificated area. Whether a nonutility can provide sewer service within this same geographic area cannot be determined by the Authority in this proceeding and is not an appropriate consideration in determining whether a certificate should be granted.

2. The grant of a certificate to the Company in this proceeding will not exclude a municipality from providing sewer service within the geographic area covered by the certificate when the municipality annexes territory in the certificated area.

Tennessee law is well-settled that a municipality has the power to determine who will provide public utility services within its boundaries. *Duck River Elec. Membership Corp. v. Manchester*, 529 S.W.2d 202 (Tenn. 1975); *Franklin Power & Light Co. v. Middle Tenn. Elec. Membership Corp.*, 434 S.W.2d 829, 222 Tenn. 182 (1968). When one of the municipalities in Sevier County decides to annex into the certificated service area of the Company, the municipality may elect to provide sewer service within such annexed area. The municipality may acquire the facilities of the Company by condemnation should the parties be unable to successfully negotiate the sale of the Company's facilities to the municipality. *Duck River Elec. Membership Corp. v. Manchester*, 529 S.W.2d at 207.

When a municipality annexes territory within the certificated service area of a public utility where the public utility has no facilities, the public utility is not entitled to

compensation for the area taken over by the municipality. *Lynnwood Utility Corp. v. City of Franklin, Tennessee*, 1990 Tenn. App. Lexis 228 (Apr. 6, 1990)(copy attached). Therefore, the municipalities in Sevier County which choose to extend sewer service into portions of the Company's certificated service area in which it has no facilities may do so without compensating the Company for the service area taken.

3. The grant of a certificate to the Company in this proceeding may not exclude a municipality from providing sewer service within the geographic area covered by the certificate even without annexation when service has not been provided to such area.

Whether a municipality can extend a utility service into a public utility's certificated service area when the municipality has not annexed such territory has not been specifically addressed by a court in Tennessee. In *Westland Drive Service Co. v. Southern Realty Investors*, 558 S.W.2d 439 (Tenn. App. 1977), the Tennessee Court of Appeals did mention this issue. In this case the Knoxville Utilities Board began providing water service to an apartment complex known as Timbers West which was located outside of the Knoxville city limits but within the certificated service area of Westland Drive Service Company. Westland Drive Service Company was a private water utility with a certificate issued by the Tennessee Public Service Commission to provide water service. After concluding that T.C.A. § 6-51-301(a)(1) was not applicable (which statute does not permit a city to provide water service outside of its boundaries and within the certificated service area of a public utility), the court stated, "Prior to the above amendment it was not a violation of the Tennessee statutes for KUB to serve Timbers West. See T.C.A. 6-604, 6-1304, 6-1408. Having held that the 1974 amendment has no retrospective application, the amendment would have no effect on KUB and Timbers West's valid 1972 agreement " *Id.* at

441. The three statutes cited by the court are statutes which give a municipality the right to provide utility services outside of its boundaries.

Based upon this statement by the Tennessee Court of Appeals, a municipality in Sevier County may have the right to extend sewer service into the unserved area of the Company's certificated service area even when the municipality has not annexed such territory.

4. The grant of a certificate to the Company in this case would not exclude a utility district authorized to provide sewer service from providing sewer service within the Company's certificated service area provided the sewer utility district's boundaries are expanded to include a portion of the Company's certificated service area.

A utility district has the exclusive right to provide the utility services it is authorized to provide within its boundaries. T.C.A. § 7-82-301(a). A utility district does have the power to provide the utility services it is authorized to provide outside of its boundaries, but it does not have the exclusive right to provide such utility services outside of its boundaries. T.C.A. § 7-82-302(a)(1). Whether a utility district can serve territory outside of its boundaries and within the certificated service area of a public utility has never been addressed by a Tennessee court.

The Company asserts that a utility district does not have the right to provide the same utility service a public utility has the power to provide within the public utility's certificated service area without the utility district first expanding its boundaries into the public utility's certificated service area. When the Company is granted a certificate by the Authority, the Authority has determined that the public convenience and necessity requires that the Company be issued a certificate to provide sewer service within the geographic area covered by the certificate. When a county mayor or mayors create a utility district, the county mayor or mayors have determined that the public convenience and necessity requires the creation of the utility district to

provide utility service within its boundaries. T.C.A. § 7-82-202(a). A consistent reading of these statutes would lead to the conclusion that a utility district cannot provide a utility service within the certificated service area of a public utility until the public convenience and necessity requires otherwise.

If a utility district wants to provide a utility service within a public utility's certificated service area, the utility district may file a petition with the county mayor or mayors who created the utility district to expand the utility district's boundaries to include territory within a public utility's certificated service area. If such a petition is granted, the utility district may be able to argue it has the right to serve within a public utility's certificated service area. Of course, the county mayor or mayors who must act on such a petition must consider whether any existing utility service is being provided within the expanded boundaries in determining whether the public convenience and necessity requires such expansion. If a public utility is willing and able to provide utility service within the proposed expanded boundaries, the county mayor or mayors should be hesitant to grant such a petition. If a public utility is not able or not willing to provide utility service within the proposed expanded boundaries, the county mayor or mayors should consider expanding the utility district's boundaries.

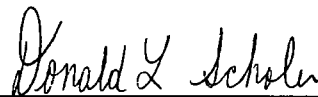
Therefore, the grant of a certificate to the Company in this case does not necessarily operate to exclude a utility district from serving within the Company's certificated service area. A utility district with the power to provide sewer service may seek to expand its boundaries into the Company's certificated service area by filing a petition with the Sevier County Mayor. East Sevier County Utility District has not filed such a petition prior to the filing of the petitions by the Company in these consolidated dockets.

### Conclusion

The grant of a certificate to the Company in this case only excludes any other public utility from providing sewer service within the Company's certificated service area until the Authority finds the public convenience and necessity requires another public utility to provide sewer service within the Company's certificated service area. The Authority has no jurisdiction over the service areas of nonutilities. The powers and rights of these nonutilities to provide public utility services are governed by other statutes in the Tennessee Code Annotated. The Authority has no power to order a nonutility not to serve within the certificated area of a public utility because it has no regulatory power over such nonutilities. To the extent the grant of a certificate prevents nonutilities as defined in T.C.A. § 65-4-101 from providing sewer service within the Company's certificated service area, such exclusion arises from the operation of other statutes governing such nonutilities and existing case law. Such questions are beyond the jurisdiction of the Authority and are not appropriate for consideration in this proceeding.

Dated this 18th day of May, 2004.

Respectfully submitted,



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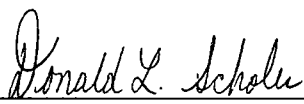
### CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Motion has been served upon the following persons on this 18<sup>th</sup> day of May, 2004 by U.S. Mail, postage prepaid.

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Mark Jendrek P.C.  
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